

IN THE

Supreme Court of the United States

October Term, 1942

No.....

BEN PRESTON, PETITIONER,

Vs

BUNKER HILL STATE BANK OF BUNKER HILL, KANSAS, et al., RESPONDENTS

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

I. THE OPINIONS AND ORDERS OF THE LOCAL COURTS

The opinion of The United States Circuit Court Of Appeals, Tenth Circuit, in case Number 2422, styled Ben Preston, Apellent, Vs Bunker Hill State Bank, Bunker Hill, Kansas, Et Al, Appellees, is reported in Fed 128 2d 162, and the date of the order of said court therein are both dated May 5, 1942 (T205), a petition for rehearing was filed in due time by the Appellent which was denied, by an order of said court entered on June 22, 1942.

The opinion rendered by the United States District Court of Kansas, First Division, in this cause, overruling petitioner's motion to remand, is dated August 2, 1941 (T 192-193). The opinion of said court sustaining the various motions of the removing Defendants for summary judgment on the ground

this action had been formerly adjudicated is dated August 2, 1941 (T 193-202) and a final judgment dismissing the action was entered by said court on August 2, 1941, (T 193 202).

II. GROUNDS ON WHICH JURISDICTION OF THIS HONORABLE COURT IS INVOKED

The Petition for a Writ of Certiorari Annexed Herewith Contains The Grounds On Which Jurisdiction Of This Court Is Invoked, under the heading

(D) REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT. Said reasons being listed as follows:

(1) The Circuit Court entered an erroneous decision in conflict with and contrary to decisions of other Circuit Courts and this honorable court on the same questions, in refusing to order this action remanded to the State Court of Kansas and in sustaining motions for summary judgment and dismissing the action on the ground that the issues herein had been formerly adjudicated and in this connection, the Circuit Court refused to follow the decisions of the Supreme Court of Kansas, thereby deciding an important local question, probably in conflict with the decisions of the Kansas Court in refusing to permit the maintenance of an action in which the defects which caused the first action to fall, have been supplied by new pleadings.

III CONCISE STATEMENT OF THE CASE

The annexed petition for a writ of Certiorari contains a concise chronological statement of the case and, therefore, in the interest of brevity and to avoid repetition, a further statement of the case will not be repeated here. See (A) SUMMARY STATEMENT OF THE MATTER INVOLVED in the attached petition.

IV. ASSIGNED ERRORS INTENDED TO BE URGED.

(a) Error of the Circuit Court in refusing to order the District Court to remand this action to the State Court of Kansas. Its decision in this regard being in conflict with and contrary to decisions of other Circuit Courts and of this honorable court on the same matter.

(b) Error of the Circuit Court in affirming the action of the District Court sustaining the various motions for summary judgment, filed by the respondents herein, on the ground that the issues presented herein had been formerly adjudicated, and in rendering judgment on the merits in favor of the respondents and against petitioner and ordering the action dismissed. In so holding, the Circuit Court has rendered a decision in conflict with and contrary to the decisions of other Circuits Courts and of this honorable court in the same matter, and has likewise decided an important question of local law in a way probably in conflict with the applicable local decisions of the State of Kansas.

V. ARGUMENT AND AUTHORITIES

FIRST PROPOSITION: THE CIRCUIT COURT ERRED IN REFUSING TO ORDER THE DISTRICT COURT TO REMAND THIS ACTION TO THE STATE COURT OF KANSAS.

The United States Statute, on removal of causes is found in Title 28 U. S. C. A. Section 71 which provides:

> "Any other suit of a civil nature at law or in equity of which the District Courts of the United States are given jurisdiction in any state court may be removed into the District Court of the United States for the proper district by the defendant or defendants therein being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which, can be fully determined is between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. And where a suit is brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state any defendant, being such citizen of another state may remove such suit into the District Court of the United States for the proper district. ****"

Plaintiff admits that the amount in controversy as to each of the defendants herein exceeds the sum of three thousand ($3000) Dollars, exclusive of interest and costs, and the only question remaining is whether or not there exists such a diversity of citizenship as contemplated by the Statute and whether or not there exists a separable controversy which would entitle anyone of the defendants or all of them to remove this action from the state to the federal court. If the plaintiff had sued only the seven corporate non-residents, seeking the removal of this action and had joined no local defendants of the State of Kansas, this cause would properly be removed to the federal court. It is a well established rule and interpretation of this statute where a local or resident of the same state as that of the plaintiff is joined with

non-resident defendants and the cause of action is joint or joint and several and there is no fraud in the joiner of the local defendants, the state court retains jurisdiction of the controversy, and the action cannot be removed to the federal court over the objection of the plaintiff. On this proposition see the following:

Lincoln Mine Operating Company vs Manufacturers Trust Company 17 Fed. Supp. 499.

"If plaintiff and one defendant were residents of Idaho where action was brought, removel of action from the state to federal court could not be had since all defendants were required to be non-residents of Idaho."

See also, Wells vs Missouri Pacific Railway Company 97 Fed. 2d 578.

"Centerville State Bank vs National Surety Company (Circuit Court appeals Kansas) 37 Fed. 2d 338, reversing district court 27 Fed. 2d 522, wherein the tenth circuit court holds:

"A federal court held to have erred in taking jurisdiction of action on a bond against the Foreign Surety Company and resident principal and trustee in accordance with revised statute Kansas. 1923; 62,2002 et seq. in view of provisions 60-414 authorizing an action against two or more on a joint obligation although obligees may be severally and separately liable.

"A Federal court cannot deny a plaintiff right to sue defendants on their joint obligation, although they may be severally liable also and when so sued, there is no right of removal in that it is the plaintiff's right to elect which obligation, joint or severally to rely on."

See also Rand vs Herculese Powder Company Inc. 28 Fed. 2d 131 to the effect that it is necessary for all defendants to be non-residents of the state in order to remove the cause to the Federal court.

In the case at bar, all of the non-residents did not join in a petition for the removal of this cause and for that reason, this action should be remanded to the state court in view of the following authorities:

Wright vs Missouri Pacific Railway Company 98 Fed. 2d 34.

"A suit on a joint cause of action against the several defendants which is commenced in a state court cannot be removed to a Federal Court unless all of the defendants join in the removal."

Town of Fairfax, Oklahoma vs Ashbrook, 3 Fed. Supp. 345,

"Petition for removal not joined in by all necessary defendants is insufficient whether removal is sought because of diversity of citizenship or non-residence where no separable controversy exists or because Federal question is involved."

We submit therefore that this action is not properly removable to the Federal Court on the grounds of diversity of citizenship alone.

The removing defendants are predicating their right to retain this case in the Federal Courts upon the proposition that there exists in addition to diversity of citizenship a separable controversy between the plaintiff herein a resident of Kansas and each of the removing defendants who are citizens of a state other than the state of Kansas. We submit

that under the following authorities there exists no separable controversy so as to permit the removal of this cause.

It is a well settled rule of the Federal Courts that in a suit to quiet title, all persons claiming on interest adversly to the Plaintiff, may be joined as Defendants, it is not essential that such Defendants claim through a common source of title. Stemmler vs McNeill Et Al. (Circuit Court, North Carolina). 102 Fed. 660:

IN SYLLABUS No. 1:

> "In a suit to quiet title to a tract of land claimed by a complaintant under one title, all persons claiming an interest in the land or any part thereof, adversly to such title, may be joined as Defendants and it is not essential that they should claim through a common source of title."
>
> United States vs Flournoy Live Stock and Real Estate Co., Et Al. (Circuit Court, Nebraska) 69 Fed. 886.

In this action, the Government brought suit, based upon a trust agreement wherein it held as trustees for the Indians, a large acreage of land, against numerous and diverse Defendants who had taken agricultural and grazing leases from the various Indians owning separate tracts of the land. The action being to quiet title in the Government as trustee for the Indians, as against all the adverse claimants, and to cancel the various leases held by the Defendants as being clouds upon the title.

The Defendants urged that the complaint should fail because there was a misjoinder of parties defendant and because of the multifariousness of the bill. In the body of the decision, the Circuit Court held:

"The second ground of demurrer is that the bill is multifarious, because it is exhibited against a large number of defendants who hold under different leases, executed by different lessors, and that there is no common interest justifying the bringing the one suit, instead of separate proceedings against each defendant.

In Walker vs Powers, 104 U.S. 245, it is said:

"By multifariousness 'is meant the improperly joining in one bill distant and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature, against several defendants, in the same bill.' Story, Eq. Pl. 271".

"In the case at bar the complainant's right of action is based upon the trust relation existing between the United States and the Indians in regard to the lands in question, and there is therefore a common interest and a common question, as against all the defendants; and therefore the bill will not be held to be multifarious, being within the rule stated in Story, Eq. Pl. *285, to wit:"

See also 110 A.L.R. 188 Annotation to the same effect. Pringle vs Storrow, 49 A.L.R., page 1222.

"But where residents and non-residents both are joined as defendants, the rule so long established, that the court will deal with the entire list of defendants as an entity and if one among them is a resident treat them all as residents for the purpose of jurisdiction, controls." See Cochran vs Montgomery County, 199 U. S. 260, 50 L. Ed. 182, 26 Supp. Ct. Rep. 58, 4 Ann.

Cas. 451; General Investment Co. vs Lake shore & M. S. R. Company, 260 U. S. 261, 67 L. Ed. 244, 43 Sup. Ct. Rep. 106.

Hughes Federal Proceedure, (page 302):

"There may be separate issues in a case, but they do not constitute separable controversies. There may be defenses which are good as to some, and not as to others, but they do not make separable controversies." Citing, Ayres vs Wiswall 112 U. S. 187; Fidelity Ins., Trust & Safe Deposit Co. vs Huntington, 117 U. S. 280; Putnam vs Ingraham 114 U. S. 57; Louisville & N. R. Co. vs Wangelin 132 U. S. 599; Riser vs Railroad Co. 116 Fed. 215.

The petitioner, herein, bases his entire cause of action and right to the relief prayed for upon the written escrow agreement, (T 20) appearing in full in the annexed petition for writ of certiorari which describes all of the acreage being sixty sections of land in Russell County, Kansas involved in this litigation, on some portion of which each of the respondents, herein, has taken subsequent leases. If the petitioner acquired no equitable title to the oil and gas rights, under this block of acreage by reason of this escrow agreement, then this entire action should fail, and if he did acquire an equitable interest therein by reason of this agreement, its extention and assignment to him, then we submit that he is entitled to maintain this action and to join as defendants all persons that cloud his title and the case should go forward in the State Court in one action and that there exists no separable controversy as to either of the nonresident defendants, so as to remove the entire case to the National Court.

The question of accounting is purely incidental and would fall by the wayside unless petitioner first establishes his right

under the escrow agreement to the leases.

See also the following authorities:—

Murphy et al. vs Johnson et al. 49 Fed. 2d 410,

The facts in this case are:

"Plaintiffs as residents of Texas and New Mexico Company filed suit in the Texas State Court for the recovery of an interest in real estate and quieting of title therein. The land involved, two tracts, one consisting of 80 acres owned in part by Johnson and others on which the Humble Oil and Refining Company held an oil and gas lease and the other containing 82½ acres owned in part by Johnson on which the Texas Company held an oil and gas lease and in which it was alleged that plaintiff owned an interest in fee as well as the mineral rights under both tracts of land and the plaintiff also sought an accounting against both oil companies for the oil producted by them from the premises pursuant to their leases and the sum of Five Hundred Thousand ($500,000.00) Dollars damages. The defendants were residents of Texas, Illinois, Deleware, and Oklahoma and consisted of corporate as well as natural defendants. The petition alleged that plaintiffs were the owners and in possession of an undivided half interest in the land and the mineral rights and that the defendants including the oil companies, had unlawfully entered upon the land and ejected plaintiffs therefrom and were withholding possession there of and had developed the same for oil and that large quantities of oil had been removed therefrom by the oil companies for which they should account to the plaintiffs. That the leasee defendants

had entered on and had developed the land for oil with full knowledge and notice of the right and title of the plaintiffs therein and had wrongfully converted to their use and benefit, the oil and gas produced therefrom. Plaintiffs pray for judgment against the defendants and each and all of them quieting their title and possession in their undivided half interest in the land including the oil, gas, and mineral rights and for an accounting and damages. The oil company defendants sought to remove this action to the United States District Court of Texas and the plaintiffs filed in said court their motion to remand which was granted and in the body of the opinion, the Texas Federal Court held:

"We must first bear in mind that under the Texas System a suit in trespass to try title as well as for damages and for an equity is not only permitted but is approved * * * * The question of proper parties and indispensible parties is quickly solved when we realize the suit is one for the title and possession of lands even under the National Rule and even conceding that the plaintiffs are interested in recovering from the Texas Company (The Removing Defendant) and the Texas Company only, that which the Texas Company appropriated or wasted, there is no authority to require a plaintiff to bring a number of suits against a number of tenants, or squatters, or trespassers, who are jointly holding and occupying and possessing a plaintiff's property either real or personal."

There is cited within the opinion of this case, the holding of Mr. Justice Brewer, in Massachusetts & S. Construction Company vs Cane Creek, 155 U. S. 285, 39 L. Ed. 152 as follows:

"Where the object of an action or suit is to recover the possession of real or personal property, the one in possession is a necessary and indispensible, and not a formal party."

"Wilson vs Oswego Township 151 U. S. 56, 38 L. Ed. 70 Salem Company, vs Manufacturers' Company 264 U. S. 190, 69 L. Ed. 628, 31 A. L. R. 867."

"It was further held in the body of this opinion that "An indispensible party is a party who has such an interest that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistant with equity and good conscience. Niles-Bement vs Iron Moulders' Union, 254 U. S. 80, 65 L. Ed. 145. A final decree could not be made in either the equity branch of this suit nor in the law branch of this suit without all of the parties that are now before the court being before the court. To go forward with some of them out would be wholly inconsistent with the equity which seeks to put an end to litigation by doing complete and final justice, and, therefore, it must be concluded that they are indispensable parties within this long-established rule."

"Under the allegations of the petition the natural persons entered with the Texas Company upon lands and property belonging to the plaintiffs. They ousted the plaintiffs therefrom. They are still in possession. During the time of such ouster and possession they have appropriated certain properties which in place were realty, and which after separation were personalty. The union of the cause so as to seek recovery for both is, as already observed permissible in the state court and is therefore binding on this court for

judisdictional purposes, * * * In the present case the complaint is so framed that it is impossible, from a reading of it, to state positively that the whole subject matter of the suit can be determined in a separate controversity between the plaintiffs and the Texas Co.

Myer Drug Co. vs Dollar 44 Fed. 2d 57. In order to justify a removal on the ground of a separate controversy there must be, by the very terms of the statute, a controversy which can be fully determined as between the party so seeking to remove and the plaintiffs, by the settled construction of this section the whole subject matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit.

(Torrence vs Shedd 144, U. S. 527, 36 L. Ed. 528. Davidson vs Montana-Dakota Power Co. 22Fed. 2d 688. Boatmen's Bank vs Fritzlen 135 Fed. 650, City of Winfield vs Wichita Natural Gas Co. 267 Fed. 47. That the plaintiffs and the Texas Company might determine between themselves as to how much oil the Texas Company took out of their lands does not satisfy the full measure of the suit because the plaintiffs are seeking to recover the lands from The Texas Co. also. Likewise the Plaintiffs have a right to join trespassers who act together. So there are at least two controversies in this many sided suit in which the Texas Company must keep company with the natural persons who are also defendants."

The District Court of the United States for Texas further held in the body of this opinion:

> "As important and as unquestioned as is the right of the non-resident citizen to fight a battle in the national court when the suit presents a separable controversy, there is an overriding concomitant right of a plaintiff to so carve his action as to join together in the same such controversies as may be necessary to its solution, and when a plaintiff does so, the pleader's knife may not separate one of the issues in such a suit and require its settlement in a forum other than that chosen by the plaintiff. To restate it, the plaintiffs here ask for their land and also for damages and for an equitable remedy with a beneficial recovery they are entitled to have them go forward together.** Removability depended upon diversity, and there being no separableness and a local citizen being on each side, the local court is the proper court."

We have taken the liberty to quote at length from the above and foregoing citation because we feel that it presents almost exactly the same propositions of recovery that the plaintiff, Preston seeks in the case at bar, and said case is decisive of our first proposition that the District Court of Kansas erred in refusing to remand this cause to the state court. Preston seeks to recover his interest in the land such interest being the oil, gas, and mineral rights conveyed to him by the various leases, all as set forth in the escrow agreement which covers all of the 60 sections of land involved, and he seeks to quiet his title in such interest and to oust the defendant oil companies therefrom and for an accounting of the profits which such companies have received from the premises during the time they have unlawfully remained thereon. Each of the removing defendants has taken a top or subsequent lease upon a portion of the acreage involved in this action, which acreage so claimed by each constitutes a part

of the whole, and we submit that by reason thereof, there exists no separable controversy which would entitle them to remove this action to the Federal Court.

In the case at bar, the defendant oil companies, were trespassers on plaintiff's equitable title rights in said lands:

> "A mere trespasser cannot set up the defense of stale demand, (laches) against the holder of an equitable title." Wright vs Dunn (Tex.) 11 S.W. 300; McCoy vs Pease, (Tex.) 48 S. W. 208; Carmichael vs Ballard, (Tex.) 31 S. W. 80; Grant vs Hill, (Tex.) 30 S. W. 952; Edwards vs Gill (Tex.) 23 S. W. 742.
>
> The defendant oil companies went upon these lands, knowing of plaintiff's rights therein, after the Notices of Judge Bottom were served upon them in 1930. (Less than 15 years prior to the bringing of this action) See:
>
> Woll vs Voigt (Minn.) 117 N. W. 608, 23 L.R.A. (NS) 270.
>
> "A trespasser upon land cannot claim by reason of his unlawful occupation thereof (for less than the legal limitation period) that the real owner, although he had knowledge of the trespass, is estopped to sue for damages for the wrongful acts committed."

Note, following the case of Woll vs Voigt, supra:

Wayzata vs Great Northern R. Co. 49 N.W. 205, 23 L.R.A. (NS):

> "Which was an action to restrain the defendant from maintaining and operating its railway, and from maintaining buildings, on certain streets of the plaintiff village, and in which it was held that one who entered upon and possessed the land of another with-

out right—a mere trespasser and knowing that he was such—could not, no matter to what use he might have put the land, or how much he might have improved it or expended upon it, claim that the owner was estopped, by mere delay in ousting him, to seek any remedy, legal or equitable, appropriate to the case.", 38 Cyc, 1074.

"Trespass to realty is a local action, and cannot be brought outside the jurisdiction where the land lies, and so cannot be brought outside the county where the land lies."

THE CASE AT BAR IS LOCAL, NOT TRANSITORY

The supreme Court of Kansas quoted with approval from the case of Ophir Silver Mining Co. vs. Superior Court, 147 Calif., 467, 82 Pac. 70, wherein it said, "an action to enjoin a trespass on land was held to be local and, being local, could only be brought in the State or County where the land was located, and not being brought there it should have been dismissed as without jurisdiction.

The above case is one in which the defendants entered the lands of the plaintiff for the purpose of exploring for, mining and removing ore therefrom. Defendants were enjoined from continuing such operations. The court held the defendants were trespassers, and that the action was local.

Maces vs Mayfield et al. 10 Fed. 2d 231.

It is held in this case that in a mortgage foreclosure proceeding all parties having an interest or claim including all lien claimants in the premises are necessary parties and that there is but a single cause of action and although each of the

defendants may have a separate defense there is not presented a separable controversy as to any of them. This was necessary in order to give the plaintiff a complete decree permitting him to forclose and sell the property free of all encumbrances and to give good title to the purchaser.

> See also: Citizens and Southern Bank of South Carolina vs. Pine Forrest Inn Company et al. 31 Fed. 2d 302 for the same holding.
>
> Also Ames vs Chicago S. F. Railway Company et al. 39 Fed. 881. Bryan et al. vs Borriger et al. 251 Fed. 328.

Perrin, administrator vs. Lepper et al, 26 Fed. 545. In the body of the opinion in this case, speaking on the question of what conseieutes an indispensible party, the circuit court of Michigan held:

> "The question in each case is whether the party whose presence would defeat the jurisdiction is an indispensable party to the controversy between the parties who are citizens of different states. Subsequent cases of fully established doctrine that where a party occupies a neutral position and is in a manner a stakeholder or trustee or otherwise bound to account to one of two other parties, he is an indispensable party to the controversy between them, if he still has possession of the fund or property to be accounted for." This cause was remended to the State Court on the grouds there was no separable controversy.

O'Neil Insurance Commissioner vs Birdseye et al. 244 Fed. 254.

The facts briefly in this case are:

A citizen of Pennsylvania brought suit in the New York State Court against a citizen of New Jersey and other defendants, some of whom were residents and citizens of New York. The New Jersey citizen alone seeks to remove the cause to the Federal Court. The petition alleges that Birdseye, the New Jersey citizen and others fraudently conspired to and did divert certain real property from the defendant insurance company for which the plaintiff had been appointed receiver, and asked that the diverted property be impressed with a trust in favor of the plaintiff receiver and that certain defendants be directed to transfer and deliver over to the plaintiff suitable deeds and conveyances for said property free and clear of any liens thereon. In determining whether or not there was a separable controversy and whether or not the cause should be remanded to the state court, the United States District Court of New York, stated in the body of the opinion:

"Plaintiff objects further to the removal of the cause upon the ground that the defendant Birdseye has failed to have other defendants join in this application. This is a valid objection unless it can be said that the cause of action is separable."

McNaull vs. West Indian Securities Corporation, 178 Fed. 308.

Miller vs. Clifford, 133 Fed. 880.

Westside Railway Company vs. California, 202 Fed. 331. * * * *

The action is in equity, in which it became necessary to bring in other defendants so as to obtain the equitable relief sought. I cannot distinguish this case

from Baillie vs Backus, 230 Fed. 711, where it is held that one conspirator alone could not remove claiming a separable controversy. I think this objection to the removal is valid."

It is to be born in mind that the Federal Courts follow the State Courts in determining what matters may be merged or litigated in the same suit and as to what parties may be joined as defendants. In this connection we cite the following Kansas Authorities:

STATUTES:

G. S. 1935 Section 60-411:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the question involved therein."

Wohlforth vs Wohlforth 123 Kansas 142, 254 P. 334, holds that third parties claiming to own property or interest therein under this section are properly made parties defendant in the case. To the same effect, see also Braden vs Neal 132 Kansas 387, 295 P. 678.

G. S. 1935 Section 60-601,

"The plaintiff may unite several causes of action in the same petition whether they be such as have been heretofore denominated legal or equitable or both. But the cause of action so united must effect all the parties to the action except in actions to enforce mortgages or other liens."

Scantlin vs Allison 32 Kansas 3764 P. 618 interprets this section so as to permit the joining of a partition suit and a suit for the collection of rents and profits as one; Barnsdall Refining Company vs Iola City Oil and Supply Company, 137 Kans. 247, 20 P. 2d 473. In this case, the supreme Court of Kansas holds that it is proper to join legal and equitable causes of action in one suit.

G. S. 1935, 60-512,

Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants, but if the consent of one who shoul be joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition."

Theissen vs Weber, 128 Kan. 556, 278 P. 770. It is held in this case that all parties united in interest must be made plaintiffs or defendants. See also Price vs. Carmean 136 Kansas 744, 18 P. 197.

G. S. 1935 Section 60-501,

"Action for the following causes must be brought in the county in which the subject of the action is situated; except as provided in the next section. First, for the recovery of real property or of any estate or interest therein or for the determination in any form of any such right or interest or to bar any defendants therefrom. * * * * "

Martin vs. Battey, 87 Kans. 582, 125 P. 88; it is held in this case that an action to quiet title must be brought in the county where the land is located.

Randall vs Ross, 94 Kans 198, 147 P. 72 holds that the county where the land is situated has exclus-

ive jurisdiction in setting aside a deed to the property. See also Black vs Black, 131 Kansas 154, 289 P. 480.

G. S. 60-201,

"Civil Actions; parties, plaintiff and defendant.

The distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished. And in their place, there shall be hereafter but one form of action which shall be called a civil action. In such action the party complaining shall be known as the plaintiff and the adverse party as the defendant."

It is held in the case of Kelso vs Norton, 65 K 778, 80P. 896 and in the case of Investment Company vs Burdick, 67 K. 329, 78 P. 781 that all distinction between law and equity under the law of Kansas are abolished.

The removing defendants contend that because plaintiff asked for an accounting against them, that this phase of the law suit constitutes a separable controversy peculiar only to each of such defendants. Particularly does the Defendant, Kaw Pipeline Company urge that it is entitled to remove this case from the State Court on the point, insofar as no other relief is asked in the petition as against it than that of an accounting and it argues therefore, that if this action is removeable to one defendant it carries the entire case into the Federal Court to all defendants. Plaintiff submits that there is no separable controversy created by reason of the accounting which is prayed for because the accounting feature of the case is merely incidental, or an appendage to the main relief sought. The plaintiff in this action would not be entitled to an accounting as against any of the defendants unless he can first establish his right to the primary relief sought, that of title and possession of the mineral rights conveyed to him by

the escrow agreement and the leases referred to therein. On this proposition we submit the following authorities:

Mayor etc. of New York vs New Jersey Steamboat Transportation Company, et al., 24 Fed. 817.

The plaintiff in this case brought suit for a permanent injunction to restrain the operation of a ferry and also asked for an accounting of the funds taken in by the operator during the period of time involved. The operator being a non-resident, defendant, sought removal of the cause to the United States District Court of New York on the grounds that there existed a separable controversy as to it due to the accounting feature which was attached to the injunction proceedings. The United States Court in remanding the cause stated in the body of the opinion:

> "I am unable to obtain the removal upon the ground alleged that there is more than one controversy in the cause because the complaint demands an account of the sums of money received by the defendant or any or either of them from operating said ferry and that they pay the same to the complainant. The cause of action, viz. to restrain the running of the ferry is one and indivisible. Though many persons may be engaged in the enterprise, the complaint in general terms charges that it is run by the defendants. The account demanded from each is a mere incident to the principal relief and does constitute a several controversy as in the case of Boyd vs Gill (Citing cases) where the cause of action itself was joint and several."

The court goes on to hold that because a matter is joint and several does not necessarily make out of it a separable controversy.

Johnson et al. vs Jordan et al, 22 Fed. Supp. 286,

"Separate answers of defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies so as to entitle the defendant to remove the cause to Federal Court. Since defendant has no right to say that an action shall be several which a plaintiff elects to make joint."

"In determining whether there is a separable controversy so as to give defendant right to remove cause to Federal Court, the main dispute must be considered. Where the relief sought against one of several defendants is merely incidental to the principal purpose of the suit, the fact that such incidental relief pertains to only one of the defendants does not make it a separable controversy so as to give such defendant the right to remove the cause to the Federal Court.

"After a construction of state statute by state court of last resort, a Federal Court should not adhere to its former contrary construction of the state statute, but should accept the construction of the state court."

The facts in this case are, plaintiff brought suit in the Oklahoma State Court for personal injuries against Jordan and the insurance carrier that executed Jordan's bond required by the Oklahoma Law. The insurance carrier sought removal on the grounds there existed a separable controversy to the cause the plaintiff was proceeding in tort against Jordan and on contract against the insurance carrier.

In discussing the question as to whether or not his separable controversy existed, Judge Rice in the body of the opinion stated,

"In applying the rule, it is necessary to keep in mind the principal of law that the cause of action is the subject matter of controversy and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings.

Louisville and Nashville Railroad Company vs Ide, 114 U. S. 52, 29 L. Ed. 63.

Torrence vs Shedd, 144 U. S. 527, 36 L. Ed. 528.

"Where the relief sought against one of several defendants is merely incidental to the principal purpose of the suit, the fact that such incidental relief pertains to only one of the defendants does not make it a separable controversy so as to give him the right of removal. Citing Fidelity Insurance Co. vs Huntington 117 U. S. 280, 29 L. Ed. 898 wherein it was held:

"The judgment sought against the Fidelity Company is incident to the main purpose of the suit, and the fact that this incident relates alone to this company does not separate this part of the controversy from the rest of the action.' "

The case was remanded by Judge Rice to the State Court.

See also Ferris vs Wray, et al, 22 Fed. Supp. 135 for the same holding by U. S. District Judge Vaught of Oklahoma.

Watson vs. Chevrolet Motor Company, 68 Fed. 2d 686.

Boehne vs Southwestern Bell Telephone Co., et al, 10 Fed. Supp. 788.

In this case, the plaintiff brought suit in the Texas State Court praying for actual damages and exemplary damages by reason of negligence against the Telephone Company and its employee, Powell, a citizen of Texas. The Telephone Company sought to remove the cause to Federal Court on the grounds there existed a separable controversy because plaintiff had asked for exemplary damages against said company. In the body of the opinion, Judge McMillan stated:

> In so far as the suit is for actual damages, there is no doubt that under the decisions of both the Texas and Federal Courts, the cause of action is joint, and this is true despite the fact that the liability asserted against the master grows soley out of that relationship. (Citing numerous cases)
>
> "The matter accordingly must hinge upon the answer to the question whether the claim for exemplary damages against the Telephone Company constitutes a separable controversy of that character contemplated by the removal statute. 28 U. S. C. A., Paragraph 71. The word controversy as used in this connection, usually means something less than the whole suit. It contemplates a cause of action included within the suit, which can be separated and disentangled therefrom. Such controversy is involved within the purview of the statute whenever any property or claim of the parties capable of pecuniary estimation is the subject of the litigation, and is presented by the pleadings for judicial determination. Harrison vs Harrison 5 Fed. 2d, 1001. Where the relief asked against one of the defendants is merely an incident to the main case, the fact that such incidental relief relates only to one defendant does not accord to him the right of removal. (Citing Fidelity Insurance Co. vs Hunting-

ton 117 U. S. 280, 29 L. Ed. 898, and Campbell et al. vs Milliken et al, 119 Fed, 981."

The court in this case went on to hold that insofar as the Texas Courts held, that exemplary damages cannot be recovered against a party in the absence of actual damages and that exemplary damages hinged upon the demand for actual damages that no separable controversy existed because this feature of the case would fail in the absence of the plaintiffs recovery of actual damages and the motion to remand the case was granted.

Finn, Sheriff vs Rotating Valve Corporation, 25 Fed. Supp. 206. In this case the defendant against whom an attachment was levied sought to remove the attachment proceedings to the Federal Court on the grounds of a separable controversy. In the body of the opinion the U. S. District Court of New York held:

> "The defendant might have removed it but did not. It is still pending in the State Court. The suit in aid of attachment is merely auxiliary and incidental to the main suit. It has been recognized for years that a suit or proceeding which is not an independent and separate litigation but rather a branch or appendage of another suit is also removed. (Citing cases). It makes no difference that by New York practice a proceeding to perfect an attachment is termed an action."

American Automobile Insurance Company vs Freundt, et al. 103 Fed. 2d 613:

> "Where garnishment under state law does not partake of nature of an independent litigation, but is merely auxilliary to main action and a means of securing satisfaction of judgment therein, it is not a

suit of a civil nature at law or in equity removable to Federal Court under removal act."

This same rule is followed by the United States District Court for the eastern District of Oklahoma in the case of Layley et al. vs Whities et al. 24 Fed. Supp 698, wherein Judge Kennamer stated in the body of the opinion,

"The Supreme Court of Oklahoma has determined that garnishment after judgment is practically an equitable execution brought for the purpose of reaching non-leviable assets and is a means provided for obtaining satisfaction of a judgment of a creditor out of the property of the debtor. (Citing First National Bank of Corrdell vs City Guaranty Bank of Hobart 174 Ok. 545, 51 P. 2d 573 and Davidson vs Finley 96 Ok. 291, 222 P. 678. It is thus well established that the proceedings in garnishment after judgment is auxiliary to the main case and is only a means provided for obtaining satisfaction of a judgment. It has not been construed by the Supreme Court of Oklahoma to partake of an independent action, but is practically an equitable execution. The construction of the statutes of Oklahoma governing garnishment proceedings after judgment is binding upon this court, Citing Erie Railroad Company vs Tompkins 304 U. S. 64, 82 L. Ed. 118.

114 A. L. R. 1487 and Ruhlin vs New York Life insurance Company 304 U. S. 202, 82 L. Ed. 1290."

Hoffman vs Metz et al. 31 Fed. Supp 204 U. S. District Court of Pennsylvania said in the body of the opinion in this case, page 206,

"With the contention that a separable controversy exists, here I cannot agree. This action was

brought for the purpose of determining title to real estate in such action all claimants are proper parties and necessary for the complete determination of the controversy. Murphy vs Johnson, D. S. 49 Fed. 2d 410. The declaration alleges that the defendants acting in concert have taken possession of the land. It is clear therefore that the title to this land cannot be established without the joinder of both of the defendants and since Metz and Hoffman are both residents of Pennsylvania, this court is without jurisdiction to hear and determine the case."

For other cases holding that in actions to try title and to oust trespassers there from wherein it is necessary to make numerous defendants parties, such actions do not present separable controversies so as to permit removal to the Federal Courts, See,

189 Fed. 247 vs Sharp.

Hogue et ux. vs Strickler Land and Timber Co., 69 Fed. 2d 167 and

70 Fed. 2d 722, Certiorari denied in 293 U. S. 591, 79 L. Ed. 686, Lynes vs Standard Oil Company et al. 300 F. 812,

"The defendant has no right to say that an action shall be separable which the plaintiff elects to make joint and cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way and it is well settled that an action for tort which might have been brought against many persons or against anyone or more of them and which is brought in the State Court against all jointly contains no separable controversy which will authorize its removal by some of the defendants to the Federal Court. The cause of action is the subject matter of

the controversy and that is for the purpose of the suit whatever the plaintiff declares it to be in his pleadings.

(Citing Cases)

The filing of separate answers tendering separate issues by several defendants sued jointly in the State Court in on a joint cause of action does not divide the suit in two separate controversies so as to make it removable. A separate defense may defeat a joint recovery but it cannot deprive the plaintiff of his right to prosecute his own suit to final determination in his own way nor does it give the defendants any right to remove the suit. (Citing cases).

Tillmann vs Russo Asiatic Bank 51 Fed. 2d 1023. (Second Circuit)

The court stated in the body of the opinion in this case:

"There were joined in the complaint two entirely disconnected causes of action having neither a common subject matter nor any other relation except that the plaintiffs and defendants were the same and the causes of action were and under the practice might be united in the same declaration. While the causes of action were in every sense separate there was no separable controversy within the meaning of the statute. A separable controversy does not arise from a joinder of numerous unrelated causes of action in order to eliminate many trials. (Citing Cases)"

Bagwell vs Southern Railroad Company et al. 21 Fed. Supp. 751. The U. S. District Court of South Carolina spoke in the body of the opinion in this case as follows:

> "That the cause of action is the subject matter of the controversy and that it is for the purpose of the suit whatever the plaintiff declares it to be in his pleadings. That a separate defense may defeat a joint recovery but it cannot deprive the plaintiff of his right to prosecute his suit in his own way nor does it give the defendant any right to remove the suit, the fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts any more than it does a joint action on contract.

Forrest vs Southern Railway Company et al. 20 Fed. Supp. 851."

If there exists any doubt as to whether or not a cause of action presents a separable controversy on the question of removal of causes the doubt should be resolved against the removal so as to permit the case to be retained in the State Court. In support of this rule we cite the following:

McCaffrey et al, vs Wilson and Company et al, 10 Fed. 2d 368. In the body of the opinion in this case the Federal Court of Massachusetts stated:

> "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. The right of removal being in derogation of state sovereignty the act granting it ought not to be enlarged beyond what is definite and free from ambiguity.
>
> Citing Vandeventer vs C. and O. Railway Company, 160 U. S. 653, 43 S. Ct. 230 67 L. Ed. 443."
>
> For the same holding see also:

Kuhn vs Pacific Mutual Life Insurance Company of California, 37 Fed. Supp. 100.

The removing defendants in this case do not allege or contend that the local defendants of Kansas are improperly or fraudently joined with the non-residents. We, therefore submit that since there exists no diversity of citizenship and since all of the non-residents did not join in a petition for removal and further, since there exists no separable controversy as contemplated by the statutes so as to permit removal of this cause on that ground, that plaintiff's motion to remand this cause to the State Court should have been sustained and the Federal Court committed error in overruling said motion. The petition shows on its face that the main relief sought is that of quieting title and possession and the recovery of plaintiff's interest in the oil, gas, and mineral rights in the entire block of acreage involved as reflected by the terms of the escrow agreement and for an accounting which is an incidental relief that would naturally follow the main question involved in the event plaintiff is successful he is establishing his right to the leases or the mineral right in said block of acreage and consequently the accounting question does not present a separable controversy as to any of the defendants seeking a removal on that ground since the accounting question cannot be determined alone in a separate action because it hinges upon the main proposition as to whether or not the plaintiff is entitled to any interest whatever in the land involved or the oil, gas, and mineral rights therein.

We respectfully submit therefore that the decision of the Circuit Court on this proposition is contrary to and in conflict with the authorities cited herein, and that this court should reverse the decision of the Circuit Court of Appeal and order that this action be remanded to the State Court of Kansas, from which it was removed.

SECOND PROPOSITION: THE CIRCUIT COURT ERRED IN AFFIRMING THE DISTRICT COURT SUSTAINIING THE VARIOUS MOTIONS FOR SUMMARY JUDGMENT AND ADJUDGING THAT THE ISSUES PRESENTED HEREIN, HAD BEEN FORMERLY ADJUDICATED AND IN RENDERING JUDGMENT ON THE MERITS OF THE CASE, IN FAVOR OF THE RESPONDENTS AND AGAINST THE PETITIONER AND DISMISSING THE ACTION.

Rule 56 (b), Federal Practice, permits a defendant to move for a summary judgment. Vol. 1, Federal Rules Decisions, in case of United States vs Turner Milk Co., 1 F. R. D. page 643, construes this section as follows:

> "The existence of a controverted question of fact prevented the entering of a summary judgment as required by plaintiff."

So, therefore, when a party moves for a summary judgment, such motion is directed at the plaintiff's petition, and has the same force and effect as a demurrer, and as such, admits all of the allegations of plaintiff's petition.

We pause to mention only a few of the allegations of plaintiff's petition which are admitted by the motions for summary judgment: They—

(a) Admit execution of the escrow agreement and extension thereof.

(b) Admit the execution of the leases and placing them in escrow.

(c) Admit that a well was spudded in within the time specified.

(d) Admit that demand was made for the leases.

(e) Admit that escrow holder refused delivery.

(f) Admit that plaintiff became equitable owner of leases when well was spudded in.

(g) Admit that plaintiff never diverted himself of equitable title.

(h) Admit that defendants took top leases after having both record and actual notice of plaintiff's ownership.

(i) Admit they were notified, by registered mail, before entering said lands, of plaintiff's ownership.

(j) Admit continuous litigation.

(k) Admit that such litigation clouded plaintiff's title.

(l) Admit that the top leases clouded plaintiff's title.

(m) Admit that Preston complied with his contract so as to entitle him to possession of leases.

We direct this Court's attention to the Journal Entry Overruling plaintiff's motion to remand and entering summary judgment for Kaw Pipeline Company, Magnolia Petroleum Company, City Service Oil Company and Cities Service Gas Company (R. 195-6-7), and state to this court that no reason whatever is shown in said Journal Entry for the Court's holding in refusing to remand, or for sustaining the motions for summary judgment.

Defendants, corporate, (Respondents herein), contend that by reason of an order of the United States District Court of Kansas, in the former case made on the 7th day of August 1939, and affirmed by the Circuit Court of Appeals, 113 F (2d) 311, that plaintiff is estopped from proceeding further and that the matter is res adjudicata. Just what did the court do on the 7th day of August 1939? We quote from the order sustaining the motion to dismiss.

> " * * * plaintiff's cause of action is barred by laches and the statute of limitations at the time the complaint in the case was filed irrespective of the exact theory of the complaint."

The above and foregoing quotation shows the only reason given by the court for dismissing the complaint. The only grounds upon which respondents can base their claim of res adjudicata is that it is barred on laches and the statute of limitation.

When a case is dismissed on the grounds of laches or the statute of limitations, is it a bar to further proceedings in a separate and distinct action? The general rule found in 30 Am. Jur. 944, Sec. 208, Judgments:

> "In stating the doctrine of res judicata, the courts refer to the fact that the judgment sought to be used as a basis of the doctrine was rendered upon the MERITS, since it is a general rule that a judgment rendered on any grounds which do not involve the merits of the action may not be used as a basis for the operation of the doctrine of res judicata. Under this rule, an adjudication on grounds purely technical, where the merits cannot come into the question, is limited to the point actually decided, and does not preclude the maintenance of a subsequent action brought in a way to avoid the objection which proved fatal in the first action.

Allen vs Garnett, 100 Fed. 2d 555. At page 556 Justice Bratton, in writing the opinion used this language:

> "A judgment sustaining a demurrer and dismissing the action does not preclude a subsequent suit upon the same cause of action where the demurrer raised only formal or technical defects, or a lack of juris-

diction, or a misjoinder of parties, or some other cognate imperfection."

United States vs New Amsterdam Casualty Company, 55 Fed. 2d, 377. Justice Patterson at page 378 used this language:

> "But, where the demurrer in the first action was sustained because of a defect in the pleadings or because other matters not going to the merits, the judgment of dismissal is not a bar to another suit wherein the defect is supplied." Citing Gilam vs Rives 10 Pet. 298; 9 L. Ed. 432; Hughes vs United States, 71 U. S. (4 Wall) 232; 18 L. Ed. 303; Freeman on Judgments, Sec. 747.

Henrietta S. Gould, Executrix, vs Evansville & Crawfordville Ry. Co., U. S. Supreme Court Rep., 23 L. Ed. 416, Section 2 of syllabus reads as follows:

> "If the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right."

Homer vs Brown, 14 L. Ed. 975, in which the court used this language:

> "A judgment of nonsuit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent state of the case, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be non pros'd and is liable to pay the costs. But as nothing positive can be implied from the plaintiff's

error as to the subject matter of his suit, he may reassert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not." Citing authorities. Gilmer vs Morris, 46 Fed. 333.

"The dismissal of a bill in equity on demurrer, on the ground that the statute of limitations had run, is no bar to a subsequent suit alleging other facts which take the case out of the statute."

The above and foregoing citations seem to settle the rule followed by the Federal Court. Since this cause of action arose in Kansas, the law and construction of the statute given by the highest courts of Kansas is binding on the Federal Court. Let us see what construction the highest courts of Kansas have placed on pleadings of like nature. See McClung vs Hohl, 10 K. A. 93, 61 Pac. 507. (This holding approved by Supreme Court of Kansas, in Penquite vs General Accident & Life Ins. Co. 126 Kan. 511, 268 Pac. 851).

"A judgment dismissing a case because the petition does not state facts sufficient to constitute a cause of action against the defendants either on demurrer or motion thereto is not a bar to a subsequent suit on the same cause of action wherein the omitted allegations are supplied." (Sec. 1 of Syl)

When the first case was filed in the Federal District Court of Kansas, various defendants filed motions to dismiss (Record 119). In these motions (b) they used this language: "Said petition fails to state a cause of action or claim upon which relief can be granted by this court." Now these same defendants, in the case at bar, contend that said petition in that case, did state a cause of action, and the order of dismissal based upon said motion, (record 123, and affirmed by the Circuit Court of Appeals (Record 125), is a determination of

this action upon its merits, and that matter is res adjudicata.

Referring again to McClung vs Hohl, Supra, we quote:

> "Inconsistency-Estoppel. A party to a suit who obtains the dismissal thereof upon demurrer or motion, on the ground that material allegations are not in the petition, will not be heard to say in a subsequent suit on the same cause of action that the petition did contain them, for the purpose of claiming a bar by the judgment of dismissal."

The original case No. 4296 in the U. S. District Court went up to the Circuit Court of Appeals and was there docketed as No. 2142. The issues presented to the Circuit Court could not be enlarged on appeal to that court. This narrowed the issues presented in that appeal to the sole question of whether the petition as drawn, together with all reasonable inferences, contained facts sufficient to constitute a cause of action, and certainly could not, and did not go to the merits of the case. (See Record 125 for opinion of Circuit Court.)

Referring again to the Kansas case of McClung vs Hohl, Supra, we quote: (Opinion on page 96)

> "Had she elected to abide the judgment of dismissal and brought immediately a new action containing the necessary allegations, which were absent from her former petition, it could not have been urged by the Reeds or those claiming under them that the former petition was sufficient or that the added allegation or allegations were not essentially additional allegations and necessary to constitute a cause of action on the mortgage against them. They would not be permitted thus to play FAST AND LOOSE WITH THE COURT,* * * "

Penquite vs General Accident & Life Ins. Co., 126 Kan. 511; 268 Pac. 851, 1st syl.

> "Judgments-Res Adjudicata-Judgment on Demurrer. A judgment dismissing an action on demurrer because the petition does not state facts sufficient to constitute a cause of action is not RES ADJUDICATA or a bar to a subsequent judgment in the same cause of action where a substantial allegation added or an omitted one supplied by amendment to the petition by leave of court."

Quoting from opinion in the Penquit case, on page 513:

> "As to the claim of the appellant that this is RES ADJUDICATA, having been fully and completely determined in the former hearing on the demurrer to the petition, we think any substantial addition to the allegations of the petition, setting forth facts not theretofore contained in the original petition, or anadvertently omitted therefrom, if it is a material and additional allegation to the issues already involved, will require on the hearing of a demurrer to the amended petition a new and different ruling, and on the trial a new and different judgment, and with such amendment the case is not RES ADJUDICATA."

In the opinion of the Circuit Court in case No. 2142, (Record 125) the court with only the original petition before it stated on page 128:

> "Fourteen years have passed since plaintiff spudded in his well and claims to have been entitled to the possession of these leases. During all of these years plaintiff stood by and did nothing to enforce the claim which he now asserts."

Again in this opinion (Record 129), with only the original petition befort it, the court stated:

> "It is also to be noted that the litigation instituted by the Bunker Hill State Bank terminated in 1926 and that the suit instituted by Taylor was not begun until 1934. There was, therefore, a period of eight years when apparently no litigation was pending."

The petition in the instant case (Record 12-62 shows that during, the 'Fourteen' year period plaintiff did not stand by and do nothing, but was active during all of that time asserting his rights and claims of ownership, and also that during the eight year period mentioned by the court there were five other cases brought and pending during said 'eight' year period. These were material and additional allegations, and brings the case squarely within the holding of the Kansas Court in the Penquite case, supra, and overcomes the charge that plaintiff was guilty of laches.

Quoting again from the Penquite case, supra, page 513:

> "Where the ground of the demurrer is the omission of a material allegation from plaintiff's pleading, a judgment sustaining the demurrer will not prevent the maintenance of a new suit on the same cause of action, in which the declaration or complaint supplies the missing averment." 34 C. J. 797-798. See also McLaughlin vs Doane, 40 Kan. 392; 19 Pac. 353; Mc Clung vs Hohl, 10 Kan. Ap. 93, 61 Pac. 507.

Burris vs Burris, Supreme Court of Kansas, 34 Pac. 2d 127, Section 6 of the Syllabus reads as follows:

> "Sustaining demurrer to petition for want of material allegation does not prevent subsequent judgment in same cause of maintenance of new action on

same cause of action where material allegation is supplied."

Same case, opinion at page 133, the court used the following language:

> "Under the decision in Penquite vs General Accident, Fire and Life Assurance Corp., 126 Kan. 511, 268 Pac. 851, and authorities cited therein, where a demurrer is sustained for want of a material allegation it will not prevent a subsequent judgment in the same cause or the maintenance of a new suit on the same cause of action; the material amendment being supplied either in an amended petition or in the newly filed petition."

Now, we have seen what the Supreme Court of Kansas has to say on cases of like nature, where the same identical question is raised, let us proceed further.

> Bonnifield vs Price, 1 Wyo. 223:
>
> So, a judgment sustaining a demurrer to a petition for the reason that it appears upon the face thereof that the cause of action was barred by statute of limitations, is no bar to a subsequent suit, the petition in which is so drawn as not to raise upon its face the question of statute of limitations."
>
> Morrell vs Morgan, 65 Calif. 575:
>
> "A demurrer to a complaint in which the fact of a plaintiff's infancy is not alleged upon the ground that the action was barred by the statute of limitations, is not a bar to a subsequent action in which such fact is averred."
>
> Birch vs Funk, 2 Met. (Ky) 544:
>
> "And the dismissal of a petition on demurrer on the ground of laches will not preclude the maintenance

of a subsequent suit, in which the delay is satisfactorily explained."

Goddard vs Security Title Ins. and Guaranty Co., California Supreme Court, 92 Pac. 2d 804. Section 7 of the syllabus reads as follows:

> "A judgment given after the sustaining of a general demurrer is not a "judgment on the merits" and does not constitute a bar to a subsequent action where the defects set up by demurrer are techinal or formal and can be eliminated by different pleading or correction of omissions and allegation of facts constituting a good cause of action in proper form, and where such a new and sufficient complaint is filed in the subsequent action."

For further reference leading to an axhaustive array of citations and authorities,see 106 A. L. R. 444, where we find citations sustaining the above and foregoing contention, citing authorities from the United States, California, Florida, Illinois, Indiana, Kansas, Kentucky, Louislana, Maryland, Massachusetts, Minnesota, Missouri, New York, and South Carolina. All of the above citations are recent authorities on this point.

Further, we wish to call attention to the ablest work probably ever written on the subject of judgments—Freeman on Judgments, Vol 2, page 1575 where we find the following language:

> "But there are numerous decisions to the effect that a judgment sustaining a demurrer to a demurrable complaint cannot be successfully pleaded in bar to a subsequent action in which the complaint is perfect, though the plaintiff might, had he chosen to do so, have made the same allegations in the first action

as in the second. Under this rule, where a material fact omitted from the first is supplied in the second action, the judgment is not barred by the statute of limitations, judgment on demurrer on this ground does not bar an action in which facts are alleged taking the case out of the statute, as where a new promise is averred."

And, at page 1590 we find this language:

"The almost universal rule is that a judgment of nonsuit is not one on the merits and is therefore not a bar to a new suit on the same cause of action."

At page 1592-3 of the same authority we find this learned author using the following language:

"As generally viewed, the granting of a nonsuit is merely a ruling of law that plaintiff has not made a case entitling him to go to the jury, and determines no issue of fact. While it terminates the action it does not adjudicate its merits. A nonsuit "is but like the blowing out of a candle, which a man at his own pleasure may light again." And it can make no difference upon what point the motion is allowed, or how the judgment may be framed, or what recitals it may contain." Under no circumstances will such a judgment be deemed final, whether entered before or at the trial. Though the court postpones its action on a motion for nonsuit until after defendant has introduced evidence, the ruling and judgment of nonsuit when made is not on the merits. Nor is the situation changed by the fact that a nonsuit has been affirmed on appeal. Neither does the fact that plaintiff has failed to appeal defeat his right to bring a second action under a statute permitting a new action in case

of a nonsuit "suffered" by the plaintiff. And though a judgment has been reversed upon appeal to the supreme court, and the cause remanded for further proceedings, the plaintiff, since the rule in reference to nonsuit is not altered because the case has been in the appeallate court." With numerous citations sustaining the same.

Supporting above rule we cite the case of West vs American Telephone & Telegraph Co. 311 U. S. 223, 132 A.L.R. 956, decided Dec. 9, 1940.

"The rules of decision embraced within the term "laws", under the requirement of the Judiciary Act (28 USCA Sec. 725) requiring the Federal courts to follow state laws in trials at common law, includes rules of decision commonly accepted and acted upon by the bar and inferior courts of the State, even though such rules have never been passed upon by the highest court of the State; and it is the duty of the Federal courts in such a case to ascertain from all the available data what the State law is and to apply it, rather than to prescribe a different rule, even though such a rule may seem superior and the adoption of the State rule will involve a departure from prior decisions of the Federal courts."

Rule laid down in 106 ALR Page 444:

"As declared in the original annotation, a judgment sustaining a demurrer on the ground that the complaint or petition failed to state a cause of action will not sustain a plea of res adjudicata to a complaint in which the essential allegation lacking in the former complaint is supplied. Unless otherwise specified, the following cases involve corrections by a new action: Hickey vs Johnson, 9 Fed. (2d) 498; St. Louis S.W.R.

Co. vs S. H. Bolinger & Co. 17 Fed. (2d) 924; United States vs New Amsterdam Casualty Co. 55 Fed. (2d) 377. Then follows a long list of citations from Cal., Florida, Ill., Kansas, Kentucky, La., Md., Mass., Minn., Mo., N. Y., S. C. The Kansas citations are Penquite vs Ins. Co. 126 Kan. 511, 268 Pac. 851; Burris vs Burris, 140 Kan. 208, 34 Pac. (2d) 127; Beloit Bldg. Co. vs Quinn 141 Kan. 762. 44 Pac. (2d) 232.

13 A. L. R. Page 1113:

"The courts agree that a judgment sustaining a demurrer on the ground that the complaint or petition failed to state a cause of action will not sustain a plea of RES ADJUDICATA to a complaint in which the essential allegation lacking in the former complaint is supplied. The former adjudication in such case determines no more than that the pleading, as presented, was sufficient, and NOT THAT THE PLAINTIFF HAD NOT CAUSE OF ACTION." Cites the following Federal cases: Gilman vs Rives 9 L. Ed. 432; Aurora vs West. 19 L. Ed. 42; Gould vs Evansville & C. R. Co., 91 U. S. 526; Spicer vs United States 5 Ct. Cl. 34; Smith vs McNeal 109 U. S. 426; Gilmer vs Morris, 46 Fed. 333; Haug vs Great Northern R. C., 102 Fed. 74; Miller vs Margerie, 170 Fed. 710; United States vs Dwight Mfg. Co., 213 Fed. 522. Also cites McClung vs Hohl, 10 Kan. Ap. 93, 61 Pac. 501 (Kansas)
13 A.L.R. 1117:

"So, a judgment sustaining a demurrer to a petition, for the reason that it appeared upon the face thereof that the cause of action was barred by the STATUTES OF LIMITATIONS, IS NO BAR TO A SUBSEQUENT SUIT the petition in which is so

drawn as not to raise upon its face the question of the Statute of Limitations." (Wyo.)

13 A. L. R. 1117, Birch vs Funk (Ky)

"And the dismissal of a petition on demurrer on the ground of LACHES will not preclude the maintenance of a subsequent suit, in which the delay is satisfactorily explained."
Melvin vs Melvin, 97 Pac. 696 (Cal.)

"Judgment—Conclusiveness—Dismissal on Demurrer. A judgment of dismissal of an action to establish a trust in land, rendered on a demurrer to a complaint failing to show that plaintiff had any interest in the property at the time of the bringing of the action, IS NOT CONCLUSIVE ON PLAINTIFF'S RIGHT TO ALLEGE, IN AN APPROPRIATE ACTION, THE FACT THAT SHE IS STILL THE OWNER OF THE PROPERTY."

Burnett vs Marrs, 125 Pac. 838. (Oregon)

"No judgment can be available as an ESTOPPLE unless it is a judgment on the merits. 1 Freeman on Judgments (4th Ed. Sec. 260. A judgment cannot be set up in bar of a subsequent action unless it was a final judgment on the merits, adjudicating the rights in litigation in a conclusive and definite manner. 23 Cyc. 1126. The determination of a motion or summary application is not RES ADJUDICATA, SO AS TO PREVENT THE PARTIES FROM LITIGATING THE SAME MATTERS AGAIN IN THE MORE REGULAR FORM OF AN ACTION—In order that a judgment may constitute a bar to another suit, says Mr. Justice Field in Hughes vs United States, 4 Wall. 232 (18 L. Ed. 303) it MUST BE RENDERED IN A

PROCEEDING BETWEEN THE SAME PARTIES OR THEIR PRIVIES, AND THE POINT OF CONTROVERSY MUST BE THE SAME IN BOTH CASES, AND IT MUST BE DETERMINED ON ITS MERITS. IF THE FIRST SUIT WAS DISMISSED FOR DEFECT OF PLEADING, OR PARTIES, OR A MISCONCEPTION OF THE FORM OF PROCEEDING, OR WANT OF JURISDICTION, OR WAS DISPOSED OF ON ANY GROUND WHICH DID NOT GO TO THE MERITS OF THE ACTION, THE JUDGMENT RENDERED WILL PROVE NO BAR TO ANOTHER SUIT."
Richards vs American Union Bank, 253 N. Y. 166, 69 A.L.R. 667.

"A judgment dismissing a complaint because of failure to show that any damage has been sustained is not a bar to recovery on the same cause of action in a subsequent suit in which the complaint alleges facts showing damage."

IN THE FIRST CASE Brought in the U. S. District Court of Kansas, First Division, an alternative motion was filed by the defendant oil companies. This motion asked the court to dismiss the action for the reason that the complaint did not state a cause of action, and if overruled that plaintiff make his petition more definite and certain. The court sustained the motion to dismiss, and the application made by plaintiff for leave of court to amend his complaint was denied. Before the court ruled upon the dismissal portion of the motion, plaintiff, orally ask leave to amend. This was refused by the court. After the case was sent back to the U. S. District Court, by the Court of Appeals, plaintiff then filed a written motion asking leave to amend his complaint. This was again denied to plaintiff.

No answer or pleading, except the above motion, was ever filed in either the District Court of the Court of Appeals. The issues involved have never been before any court. The case went off in the District Court on the insufficiency of the petition. The appeal to the Circuit Court did not enlarge the question determined by the lower court.

The Circuit Court stated in its opinion (128 Fed. 2d page 165) from which this appeal is lodged, in speaking of the petitioner's bill in the former case;

> "He could not amend the petition so as to escape the bar of laches which prevented him from maintaining that action. Furthermore, the court in that case, did more than enter the order dismissing the complaint; it entered a judgment against the appellant, and in favor of the defendants on the merits. The court's action constituted a final adjudication of appellant's rights, and is an effective and final bar to any further suit."

Did the Circuit Court, in its decision in the first case (113 Fed. 2d 311) render judgment on the merits of the case? We have searched the opinion and failed to find where such judgment was entered by the court. In fact this case has never at any time been tried upon its merits. None of the controverted questions raised by the pleadings have ever been tried.

The Circuit Court in its decision in the former case (page 313) states of the Plaintiff,

> "Whether he may maintain this action is to be determined by the equitable principle of estoppel and not by the applicable statute of limitations of Kansas."

The opinion goes on to say that the Plaintiff was estopped from maintaining the suit because of his own neglect and delay amounting to laches. It is the petitioner's contention herein that he has in his new action, pleaded facts, which would excuse him from the charge of laches, and has filed a petition which he is entitled to maintain under all of the decisions of the Supreme Court of Kansas.

It has been the settled law of Kansas, since 1900, that the sustaining of a demurrer or a motion to dismiss a petition for the reason that it does not state a cause of action, does not preclude the filing of an amended petition or a new suit wherein the omitted defects are supplied and such judgment is not res judicata. The Circuit Court of Appeals has apparently declined to follow this holding of the Kansas Court which leaves the petitioner herein with no place to go for redress, or to make uniform the law applicable to cases of this kind, except the United States Supreme Court. Unless this court allows the writ asked for in this case, it appears to us that a citizen of Kansas will be denied the right of having an important question of local law, applicable to the State of Kansas, decided and applied to his cause in a manner in conformity with the decisions of the Supreme Court of the State of Kansas, as applied to other litigants in the State Court, thus denying justice to the petitioner herein.

THE CASE HAS NEVER BEEN HEARD ON ITS MERITS.

> Freeman on Judgments 3rd Add'n Revised—Sec. 263. "Judgments not on Merits—Mr. Smith in his leading cases, divides those judgments which are not a bar to another action, because not on the merits, into the following classes:

1st. Where the plaintiff fails for want of jurisdiction in the court to hear his complaint, or to grant him relief.

2nd. Where he has misconceived his action.

3rd. Where he has not brought the proper parties before the court.

4th. Where the decision was on demurrer, and the complaint in the second suit sets forth the cause of action in proper form.

5th. Where the first suit was prematurely brought.
6th. Where the matter in the first suit is ruled out as inadmissable under the pleadings."

The case at bar comes squarely within the 4th provision of the above section.

Both the District and Circuit courts attempted to set out in the opinions the reason for their holdings:

> "The effect of a judgment as res judicata is not limited nor enlarged by the reasons given by the court for its rendition, nor by the failure of the court to give its reasons in writing on every point when required by the court to do so by the constitution of the State." Sec. 249 Freeman on Judgments.

The only question determined in the former action was that the complaint, as then written and before the court, did not state a cause of action. The complaint was the only thing before the court. The court had no way to look beyond the four corners of it. It had nothing except the complaint on which to base its findings. If the complaint, as written, did not state a cause of action then plaintiff, under Rule 15 of Federal Proceedure, was entitled, on application, to amend the complaint. This right was refused by the court, in that action, hence the filing of this case.

CONCLUSION

We submit that the trial court therefore committed error in refusing to remand this action to the State Court of Kansas and in sustaining the motions for summary judgment filed by respondents, and that the Circuit Court of Appeals errored in affirming the decision of the lower court, and in entering judgment in this action on its merits, in favor of the respondents, and against the petitioner and ordering the case dismissed.

It is therefore, urged that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that justice may be accorded the petitioner. And to that end, a writ of Certiorari should be granted, and this Honorable Court should review the decision and orders of the United States Circuit Court of Appeals, Tenth Circuit, and overrule the decisions of said court in this cause directing that this action be remanded to the State Court or that the motions for summary judgment filed by the respondents herein be overruled.

Respectfully submitted,

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